UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JEFFREY CHARLES BRUTEYN	§	**Case No. 03-34855 HDH-7**
	§	
Debtor	§	

BENEMAX EMPLOYEE LEASING, INC.	§	
	§	
Plaintiff	§	
	§	
v.	§	**Adversary No. 03-3681**
	§	
JEFFREY CHARLES BRUTEYN	§	
	§	
Defendant	§	

MEMORANDUM OPINION

This is a discharge and dischargeability action filed against the debtor, Jeffrey Charles Bruteyn ("Debtor" or "Defendant"), by Benemax Employee Leasing, Inc. ("Plaintiff").

A. Section 523

The dischargeability portion of the adversary proceeding is based on certain corporate checks issued by the Defendant for services provided to hotels which were the subject of a purchase agreement by a company owned or controlled by the Defendant. The checks were returned to the Plaintiff for insufficient funds ("NSF") in the corporate accounts and were never honored.

Plaintiff brings this complaint against the Defendant claiming that the amounts represented by the checks should be excepted from Debtor's discharge under Section 523(a)(2)(A) and (B).

The case law on NSF checks does not support the Plaintiff's position. The most recent NSF check case that the Court could find is *Nite Lite Signs and Balloons, Inc. v. Philopulos (In re Philopulos)*, 313 B.R. 271 (Bankr. N.D. Ill. 2004), which clearly sets out the reasons that an NSF check does not meet the requirements of Section 523 as an exception to discharge. As pointed out by the *Philopulos* court, a claim of fraud requires some form of misrepresentation. A check is not a representation, but rather an order to one's bank to pay. Thus, the Plaintiff in the instant case has shown only that the Defendant remitted corporate checks. It has failed to show that the Defendant made a misrepresentation.

On the other hand, the Defendant explained the reasons why the checks were not paid, including the fact that his agreement regarding the hotels fell through because the seller of the hotels had not honored his agreements with, and representations to the Defendant's company. Therefore, the Defendant was unable to fund the checks remitted. In testimony, the Defendant explained his intentions at the time he remitted the corporate checks. It appears that circumstances beyond Defendant's control caused the checks to be returned NSF.

B. Section 727

Plaintiff also seeks to bar the Debtor's discharge under two related provisions, Section 727(a)(2)(A) and (a)(4)(A). The former bars the discharge of a debtor for, *inter alia*, concealing property of the debtor or the estate. The latter bars the discharge of a debtor for making a false oath or account in connection with a bankruptcy case. These two provisions are used in tandem by the Plaintiff in this case. It claims that the Debtor omitted certain property and transactions from the schedules; and therefore, should not receive a discharge.

A couple of items mentioned in the Plaintiff's pleadings were not established at trial and are

dealt with summarily. Plaintiff claims, but did not show, that the Debtor is the beneficiary of a trust. He may have been at one time, but no evidence of such trust presently existing was offered into evidence. Likewise, nothing was shown at trial about a watch collection presently owned by the Debtor and not listed.

In the first version of the schedules, the Debtor omitted two club memberships. However, after consulting with the Trustee, the Debtor added the club memberships to his schedules. He testified that neither club membership had value and that he omitted them because he did not think of them. The Plaintiff did not offer any evidence that the club memberships had any value to the estate.

Plaintiff points out that Debtor did list in his schedules that he lived in a house owned by his mother and drove vehicles that were owned by a company of which his mother was the majority owner. Debtor apparently has received substantial support from his mother through funds given or loaned to him over the years. The testimony at trial suggests that Debtor lost his life's savings in the failed hotel deal mentioned above. The evidence certainly indicates that, for a grown man, Debtor depended upon his mother in an inordinate way. However, no evidence was offered at trial that he had any legal or equitable ownership in the house and cars. In addition, he had no control over the house and cars. In fact, the house in which he lived was foreclosed. The schedules refute any concealment of the house situation, because the Debtor plainly listed in his petition that he was living at the address of his mother's house.

Debtor originally did not list any amounts owed to his mother and he later amended his schedules to list her as a creditor. He explained that she had supported him in various ways over the years and that he subsequently listed the aggregate in his schedules as a debt.

The most troubling omission from the statement of affairs consisted of a ring Debtor transferred to his fiancee within a year of his case and did not originally disclose. The ring has an apparent value of $5,000. According to the Debtor, the ring is a family heirloom, actually given to him by his mother on the occasion of the engagement for the sole purpose of giving it to his fiancee. The amount involved is relatively small and it is believable that the Debtor did not fail to disclose this engagement ring with fraudulent intent.

Debtor also did not schedule initially a small amount of personal property and furniture, well within the Texas exemptions. The value of such property is a few hundred dollars. After consulting with the Trustee, the Debtor promptly added the furniture and personal property located in his mother's home.

To prevail under Section 727, Plaintiff must meet a high burden of showing that the Defendant acted with "intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property" or that he "knowingly and fraudulently" made the false oaths in the schedules. *Pavy v. Chastant (In re Chastant)*, 873 F.2d 89, 90-91 (5th Cir. 1989); *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 177-78 (5th Cir. 1992).

In this case, the Defendant and his wife testified. The undersigned saw them and their demeanor under oath. They were credible. Debtor appears to be an individual pampered by his mother, but such is not a ground to bar his discharge.

The schedules are not in perfect form. They are in handwriting and not very neat. However, they provide extensive information to the Trustee and to creditors concerning this Debtor. He has little by way of assets because his proposed hotel deal collapsed, taking his savings. His assets do not exceed the Texas exemptions. After meeting with his Trustee, the Debtor promptly amended

his schedules. He does not appear to the Court to be flaunting the system.

The Court acknowledges a line of cases which has arisen lately from note buyers combing a debtor's schedules and then filing discharge actions. *See, e.g. Cadle Company v. Mitchell*, 2004 WL 1448041, No. 03-10885, slip op. (5th Cir. June 28, 2004); *U. S. Trustee v. Moschella (In re Moschella)*, No. 04-4055, slip op. (Bankr. N.D. Tex. Aug. 9, 2004). In those cases, the note buyer has prevailed on discharge actions. In this case, unlike those cases, the original omission of the personal property, gift of the ring, club memberships with no value, and other matters mentioned above, had no real impact on the estate, the Trustee, or the creditors. In addition, this Debtor acted promptly in amending his papers when it was brought to his attention that there was information missing. Further, the Court can discern no benefit to the Debtor for the omission of certain items, *e.g.*, his mother's house and the cars, in which he owns no legal or equitable interest.

Some case law allows the finding of improper intent with a conclusion that the debtor acted with "reckless disregard" for the truth. *See, e.g., Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). Numerous careless, material mistakes in completing the schedules and statement of affairs may bar a discharge if the debtor can offer no satisfactory explanation. *See, In re Moschella, supra.*

In the instant case, Debtor promptly corrected the errors in his bankruptcy pleadings after conferring with his Trustee. The omissions were of little consequence because they involve small amounts and/or are within the Texas exemption amounts, or do not involve amounts in which Debtor has a legal or equitable interest. Debtor's explanations, under oath, as to his schedules and statement of affairs, as well as the amendments, satisfy the Court that the Debtor was not acting in an intentionally fraudulent manner, nor with reckless disregard for the truth.

As mentioned above, the undersigned saw the Defendant testify, and considered the evidence offered by both sides, and, based on the observations of the Defendant as a witness, believes that the Defendant did not have the intent required to bar his discharge.

For these reasons the complaint will be denied.

SIGNED: 2/18/05

Harlin D. Hale
United States Bankruptcy Judge